SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 268.

HENRY W. BUCKLEY, LOUIS H. SMITH, AND CHARLES W. SMITH, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF BUCKLEY, SMITH & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

WM. H. CHOATE,
JOSEPH LARCOMBE, Jr.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

No. 502.

HENRY W. DOOLEY, LOUIS G. SMITH, AND CHARLES W. OGDEN, TRADING AS COPARTNERS UNDER THE FIRM NAME OF DOOLEY, SMITH & CO., PLAINTIFFS IN ERROR, AGAINST THE UNITED STATES, DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

Two actions have been brought by these plaintiffs.

Action No. 1 is brought to recover back duties levied and collected at San Juan, in the island of Porto Rico, on articles shipped to that port from the State of New York after the ratification of the treaty of peace between Spain and the United States and prior to April 12, 1900, the date when the Porto Rico tariff act took effect.

Action No. 2 is brought to recover back duties levied and collected under said act at San Juan on articles shipped to that port from the State of New York after the date on which the act took effect.

This brief relates merely to Action No. 2, and is intended only to add some suggestions to the very full briefs of counsel in these cases.

The plaintiffs at the time of the levying and collection of said duties were and still are citizens of the United States and of the State of New York. They were engaged in the business of commission merchants, and had their main office in the city of New York and a branch office in the city of San Juan, in the island of Porto Rico, to which the shipments in question were made. The branch office was in charge of Henry W. Dooley, one of these plaintiffs.

We contend that the levying and collecting of these duties was in violation of the following provisions of the Constitution:

(1) "The Congress shall have power—

1. "To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Clause 1, section 8, Article I.

(2) "No tax or duty shall be laid on articles exported from any State."

Clause 5, section 9, Article I.

POINTS.

I.

As the act in question purports to regulate interstate and foreign commerce, which is exclusively a subject of national legislation, by

imposing duties thereon, it is plainly an attempted exercise of the powers conferred on Congress as a National Government, viz, the power to regulate commerce conferred by clause 3, section 8, Article I of the Constitution, and the power to levy duties, imposts, and excises conferred by clause 1 of the same section; and as such its tariff regulations are unconstitutional and void because the duties levied and collected under them are not uniform throughout the United States.

An examination of the act shows that, although from its title it purports to be a local enactment, its provisions attempt to regulate not only interstate but foreign commerce.

Section 2 provides, among other things, as follows:

> "That on and after the passage of this act the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries: *Provided*, That on all coffee in the bean or ground imported into Porto Rico there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding: *And provided further*, That all Spanish scientific, literary, and artistic works, not subversive of public order in Porto Rico, shall be admitted free of duty into Porto Rico for a period of ten years, reckoning from the 11th day of April, 1899, as provided in said treaty of peace between the United States and Spain."

Section 3 regulates commerce between Porto Rico and the rest of the United States. It provides, among other things:

> "That on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries."

The uniformity required by the Constitution is a geographical uniformity.

> *Knowlton* v. *Moore* (178 U. S., 41).
>
> "*The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.*"
>
> *Head Money Cases* (112 U. S., 580, 594).

The geographical uniformity required is not confined to the States, but extends to the whole "American empire."

In *Loughborough* v. *Blake* (5 Wheat., 317), Chief Justice Marshall, delivering the opinion of the court, says (p. 318):

> "The 8th section of the 1st article gives to Congress the 'power to lay and collect taxes, duties, imposts, and excises' for the purposes thereinafter mentioned. This grant is general, without limitation as to place. It consequently extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, 'but all duties, imposts, and excises shall

be uniform throughout the United States.' It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania, and it is not less necessary on the principles of our Constitution that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other."

While this has been called a dictum, it is not so in any proper sense. It is a point decided as preliminary to the decision of the precise question before the court and on which the decision of that question is rested.

The act in question lacks uniformity in that it attempts to levy duties on goods coming into Porto Rico from the States and other Territories, and on goods coming into these States and Territories from Porto Rico, but fails to make like provision for the commerce between these States and Territories; and for the further reason that it attempts to levy, on goods coming into Porto Rico from foreign countries, other and different rates of duties from those levied on goods coming into the States and other Territories from foreign countries under the present tariff act.

II.

The act, so far as its tariff regulations on commerce between Porto Rico and the States are concerned, can not be sustained as an exercise of the power of Congress to govern the Territories. The tax is not a local tax for local purposes, but a tax laid under the 8th section of the 1st article of the Constitution.

The precise question is, What is the nature of this tax or duty. Is it a local tax imposed by Congress as the local government of the Territory for local purposes, or is it a national tax, imposed by Congress under its powers to lay taxes and duties to pay the debts and provide for the general welfare under the 8th section of the 1st article of the Constitution?

The Government contends that it is a purely local tax, as appears by the statement contained in the Solicitor-General's brief at page 80, which is as follows: "These duties are not laid by Congress under the general grant of taxing power contained in the first clause of section 8 of article 1, but under the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

That Congress, as the local government of the Territory, has power to lay taxes in the Territory for Territorial purposes is fully admitted. Whether it can lay local taxes for national purposes, and thus make the Territories tributary to the States, it is unnecessary to inquire, for the taxes laid by this act are all devoted to local and not to national purposes.

The power to govern, whether it rests on the express power to make needful rules and regulations, or is derived by necessary implication from the power to acquire territory, implies the power to tax for the purposes of the Territorial government. And it is unnecessary to go into the question what limitations are imposed by the Constitution on this branch of legislation for the Territories. It may be assumed that it can not, under the form of imposing a tax, deprive anyone of his property without due process of law, or take private property for the public use without compensation, but subject to some such fundamental restrictions, it may be assumed for the purpose of this argument that the power to tax in the Territories for Territorial purposes is very broad and general, and permits all the common and usual modes of taxation and the selection of subjects of taxation within the discretion of Congress; that this power of Congress as the local government is similar to and not less broad and general than the power of the States to tax within the States for State purposes. Particular States may, by their organic law, have imposed on their legislative departments restrictions, which, in the absence of any express limitations in that respect, do not apply to the exercise of the power of local taxation by Congress. But in general it is no doubt true that as regards local taxation for local purposes Congress exercises in the Territories the like powers to those exercised by the States within the States.

What then are the tests of a valid territorial or local tax for territorial or local purposes? They would seem to be two: First, that the tax should be in its nature local and not national; and, secondly, that the purpose for which it is laid is also territorial, that is, that the proceeds of the tax are devoted to territorial and not to national purposes.

As to this second test no question arises in this case, for the duties in question are, by the statute, devoted to territorial uses—to the purposes of the government of the Territory.

It is as to the first of the above tests alone that we raise the question. What, then, is the nature of the tax?

It is confidently claimed that it is not a local tax in its nature, but a tax which for its support rests wholly on powers of the Government which are national in character.

This is not only a tax or duty. It is also a regulation of commerce under the power given to Congress to regulate commerce with foreign nations and between the States and with the Indian tribes. It is true that it is a regulation of commerce between a Territory and the States, and this particular power does not specify, in terms, commerce between the States and the Territories. It uses only the words "among the several States" and "with foreign nations." "With foreign nations" evidently includes commerce between foreign nations and the Territories as well as that between the States and foreign nations. It can hardly be doubted that this commerce clause embraces the whole internal commerce of the country as well as its whole foreign commerce. For this purpose the Territories may have been considered embryo States without naming them. And in practice the laws regulating interstate commerce have been applied to and treated as applicable to the commerce through and across the Territories and the District of Columbia.

Undoubtedly Congress has, as local governor of the Territories, the same complete control over the purely internal commerce of a Terri-

tory which each State has over the purely internal commerce of the State. But as to commerce between a Territory and the States or the rest of the Union, it is impossible to conceive of Congress as regulating it as a mere local governor of the Territory.

It is not a territorial matter or function, but a national matter or function. Such a regulation does indeed affect the Territory and its people and their rights and interests, but not exclusively, nor indeed any more than it affects the States and the rest of the Union and their people, their interests and their rights. The power to make such a regulation, therefore, can not rest on the power of Congress as local governor. It must have a broader basis. As it directly acts upon and affects the States and the rights and interests of their people, it must rest on some national power granted to Congress by the Constitution. The only possible basis for it is the grant of power to regulate commerce among the several States. It is believed that this power is broad enough to include and support the regulation of commerce between the States and a Territory, but if it is not, and if the right to regulate commerce between the States and Territories is not within the commerce clause because not expressed or not necessarily implied, then the power does not exist in Congress at all. Congress can not invade the States and act directly on the rights and interests of their people, unless the power to do so in the particular in question is granted by the Constitution. This statute under guise or pretense of local legislation reaches out and attempts acts of government over the States of a nature which Congress is incompetent to perform except as a national legislature.

Assuming, however, that the power to regulate commerce between the States and a Territory does exist and exists in the grant of power to regulate commerce, then the power is strictly national and not local, and if the regulation takes the form of imposing a tax or duty on commerce it is subject to the restrictions imposed by the Constitution on the power to tax, namely, that if the tax is a duty or impost it must be uniform, which has been held to mean uniform geographically throughout the United States. It is no answer to say that the proceeds of the tax are devoted to the use of the Territory alone. This may be essential to a local tax, but is not the only test of a valid local tax. It must be also local and not national in its nature, or in respect to the particular power of government by which it is imposed. It is quite competent, for instance, for Congress to lay a national tax and devote its proceeds to the use of a particular Territory. This it does whenever it appropriates money generally out of the Treasury to the relief of a particular Territory, as it appropriated $1,000,000 at the same session of Congress at which this act for establishing a local government for Porto Rico was passed. This is within the power to impose taxes to pay the debts and provide for the general welfare. What Congress determines, so far as the use of the public money is concerned, to be for the general welfare is for the general welfare. Its discretion can not be questioned. So, doubtless, it would be competent for Congress to lay a duty of five cents a pound on all coffee brought into the United States, and by the same act to apply the proceeds of such tax by a suitable appropriation to the relief of Alaska or Porto Rico. The tax would still be a national tax, governed by the power to lay and impose taxes and duties granted in the Constitution, and the use to which it is devoted would not make it a local tax or

bring the legislation, so far as it would be a law imposing a tax, within the power to make rules and regulations for the Territories or make it the exercise of the implied power to govern the Territories.

If this power claimed by the Government to lay duties on foreign goods imported into a Territory and on goods imported from a Territory into the States is a mere exercise of the powers of a local government and is unrestricted by the limitations on the taxing power for national purposes, then Congress could, by admitting all foreign goods free from duty into a Territory and from a Territory into the States, virtually nullify the tariff laws and destroy all uniformity in respect to the duties on foreign goods.

So this tax on commerce between Porto Rico and New York is not in its nature a local tax, but is in its essential characteristics a national tax, and must be judged and tested as such in regard to its being in conformity to the Constitution. It obviously enough is not uniform throughout the United States. It is enacted only between one Territory and the rest of the country. Such a tax can not be called uniform. Perhaps a uniform duty or tax on commerce between all the Territories and the rest of the country might conform to this requirement, though differing from that laid on foreign commerce, but this is not uniform even in this respect, and it is unnecessary to solve the question whether such a general tax would be valid. It can make no difference where the duty is collected, whether in Porto Rico or in New York, if the tax is on commerce between the two places, and the same reasoning must condemn the duty wherever collected. The place of collection does not determine or affect the nature of the tax.

Whether a duty or impost may be laid by Congress on commerce between the States, in view of the provision of the Constitution prohibiting the laying of a tax or duty on articles exported from any State (Art. I, § 9), and whether, if Congress has not this power, it can tax articles exported from a Territory to a State need not be considered in reference to this particular question now under discussion, for undoubtedly if Congress can thus lay duties on internal commerce, such duties must be uniform throughout the United States, and this particular tax or duty is not in any sense thus uniform. It is not even a uniform tax as between the Territories and the States, but limited to one Territory only. And it is not a part of an uniform system of internal taxation between all the different parts of the Union—between the States—between States and Territories and between Territories and Territories.

For these reasons we insist that the law imposing this duty violates the Constitution, because, the duty being a national and not a local tax—imposed in exercise of the national powers of the Congress and not in the exercise of its power to govern the Territories—it is not uniform throughout the United States, as all such duties are required by the Constitution to be.

It may be further observed in illustration of this point that these duties, collected in all parts of the United States, are by the terms of the act intercepted before reaching the Treasury of the United States and diverted into the local treasury of Porto Rico without a compliance with clause 6, section 9, Article I of the Constitution, which impliedly requires that all public money shall be paid into the Treasury, for it provides that "no money shall be drawn from the Treasury but in consequence of appropriations made by law," &c.

In discussing this clause of the Constitution, Story says:

> "The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance as well as upon corrupt influence and public peculation. * * * It is wise to interpose in a republic every restraint, by which the public treasure, the common fund of all, should be applied with unshrinking honesty to such objects as legitimately belong to the common defense and the general welfare. Congress is made the guardian of this treasure, and to make their responsibility complete and perfect a regular account of the receipts and expenditures is required to be published, that the people may know what money is expended, for what purposes, and by what authority."
>
> Story on the Constitution, § 1348.

Can Congress delegate this guardianship? Can it, by incorporating into a taxing act a provision that all moneys collected thereunder be paid into a local treasury, escape the obligations of its trust? Can it, by providing that such moneys be not paid into the Treasury of the United States, evade the provision of the Constitution which requires that no money shall be drawn therefrom but in consequence of appropriations made by law?

The duties levied under this act are collected in every port of the United States. They constitute a part of the public moneys in which all the citizens of the United States have an interest. They are entitled to have these moneys deposited in the General Treasury.

The act does not purport to appropriate a fixed sum for the benefit of Porto Rico, but provides that after a certain time all moneys collected thereunder be paid into the local treasury instead of the Treasury of the United States. Citizens of the United States in every part of the United States are being taxed, and all moneys collected are placed, without limit as to amount, at the absolute disposal of the legislative assembly of Porto Rico. If Congress has the power to do this thing, it has the power to nullify clause 6, section 9, Article I of the Constitution, for of necessity no money can be drawn from the Treasury which has not first been paid into the Treasury.

III.

The duties collected under the act of April 12, 1900, from the plaintiffs at the island of Porto Rico on articles exported by them from the State of New York were illegally exacted, and the collection of them was in violation of that provision of the Constitution which says that "no tax or duty shall be laid on articles exported from any State."

In *Brown* v. *State of Maryland*, 12 Wheat., 419, Mr. Chief Justice Marshall, discussing the clause of the Constitution which prohibits States from laying imposts or duties, says (p. 437):

> "An impost or duty on imports is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy

and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us they are 'things imported.' If we appeal to usage for the meaning of the word we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country."

The same reasoning necessarily applies to "exports" in the same clause. They are the things exported. They are articles themselves which are taken out of the country. A duty on exports, then, is not merely a duty on the act of exportation, but it is a duty on the thing exported. It is not, taken in its literal sense, confined to a duty levied while the article is leaving the country, but extends to a duty levied on the article at any time from the moment the article is actually started in course of transportation from the place of shipment until it has reached its ultimate destination and has become mingled with the general mass of property there.

The clause which was under discussion by the learned Chief Justice in the case just cited was not that clause of section 9, article 8, which prohibits Congress from laying a tax or duty on articles exported from any State, but was that provision of the 10th section of the same article which prohibits a State, without the consent of Congress, from laying "any imposts or duties on imports or exports."

This provision relating to the powers of a State has been interpreted in the case of *Woodruff* v. *Parkham* (8 Wall., 123), to refer only to those taxes levied by a State on goods coming in from or going out to a foreign country, and not to goods coming in from or going out to another State.

It would seem from the opinion of the court delivered by Mr. Chief Justice Marshall in the case of *Almy* v. *State of California* (24 How., 169) that it had been decided that a discriminating duty levied by a State on articles going out of it to another State was a duty on exports within the meaning of the clause quoted. But Mr. Justice Miller in the Woodruff case stated that the decision in the California case was in reality based upon the ground that the tax in question was an interference with interstate commerce, and was illegal on that ground, and not because it was a duty on exports. The question is of academic interest merely, as in every case where a tax is imposed by a State discriminating against articles coming into it from another State or articles going out from it to another State, the tax, although it may not be invalid under the clause which prohibits a State from laying duties on imports and exports, is unconstitutional for the reason that it is an interference with interstate commerce.

The wording of the clause which prohibits Congress from levying such a tax is quite different from that which prohibits a State from so doing. First, in the case of a State the kind of tax prohibited is confined to "imposts" and "duties." In the case of Congress there is no such limitation. By the use of the words "tax or duty," the framers of the Constitution clearly showed their intention to prohibit taxation

by Congress in any form whatsoever. Second, in the case of a State the things forbidden to be taxed are "imports" and "exports." Imports are defined as things coming into a country; exports, as things going out of a country. The clause itself does not specify what country, and as it was meant to limit the powers of all the States of the Union, it might well be held to refer to the whole United States; and hence the articles specified would be those articles which come into or go out of the United States. In the clause restraining the taxing power of Congress, however, the meaning is clear, as the language is not merely "exports," or its equivalent, "articles exported" but "articles exported *from any State*," and it does not leave to inference what place or locality the articles must be exported from to assume the character of exports, but expressly defines them as articles exported from any State. An article therefore assumes the character of an "article exported" within the meaning of this clause if it is about to go, is going, or has gone out of a State. It is immaterial within the meaning of the clause to what part of the world the article goes.

This clause, so far as we are aware, has never received judicial interpretation. We believe, however, that the language is explicit and is susceptible of but one meaning, which is that Congress has under no condition and in no place where it has jurisdiction to levy a tax the right to exercise the taxing power with respect to articles which have been, are being, or are to be exported from any State, whether to a foreign country or to another part of the United States. Viewed from this standpoint it is immaterial whether the taxing power be exercised in the port of New York or in the port of San Juan with respect to articles exported from New York to Porto Rico.

The prohibition is on the power of Congress to tax such articles anywhere and everywhere—in any place where Congress has jurisdiction over the subject of taxation.

Section 3 of the act of April 12, 1900, provides, among other things, that "on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of 15 per centum of the duties which are required to be levied, collected, and paid upon all articles of merchandise imported from foreign countries."

There can be no question but that this section, so far as the duty collected at Porto Rico is concerned, discriminates against, and discriminates only against, those articles which are exported from the United States to Porto Rico. It is in terms an express violation of the Constitution in that it imposes a tax on goods exported from the States. The "geographical origin" of the shipment is the basis for levying the tax. The contention of the Government tends to support this view, for we find in the brief submitted on its behalf in Goetze *v.* The United States, the following statement, page 6: "The basis of the customs laws is not ownership, but (1) the geographical origin of the shipment, and (2) the nature of the goods. The duty is imposed against the merchandise, not upon the importer."

In the present case the geographical origin of the shipment was the port of New York. The alleged authority to levy duties rests upon the fact that the articles taxed were exported from the State of New York. The Government therefore bases its contention that the tax is valid on the very fact which must of necessity establish its invalidity.

Most of the discussion in the constitutional convention on the subject of exports centered around the clause which limits the power of the several States. As to them it was intended to prevent discrimination as against each other. We find, however, that this prohibition on the taxing power of Congress was inserted mainly for the purpose of fostering our home industries, and that it was sought by the framers of our Constitution to insert a provision which would effectually prevent any legislative attempt to restrain such industries.

Restraint by foreign Governments they could not prevent. Restraint by Congress, however, they could and did prevent.

It may be that the Government will contend that the same rule applies to the clause which restrains the power of Congress as to the one which restrains the power of the individual States, and that the prohibition as to Congress refers only to those articles which are going out of a State to a foreign country; but this contention could only be applicable to the present case if the Government is prepared to admit that Porto Rico is not a foreign country for purposes of taxation; that is, that for such purpose it is an organic part of the United States. If the Government makes this admission it is conceding its whole case, so far as it rests on the theory that Porto Rico does not form an organic part of the United States, a theory which we believe has been already fully refuted in argument. The proposition, however, is too clear to require argument that for the purposes of tariff regulation the island can not at the same time be domestic and foreign.

The arguments of the learned counsel for the Government call to mind the criticism of our Constitution made by Gouverneur Morris who, in writing to Timothy Pickering in 1814, said: "But, after all, what does it signify that men should have a written constitution containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power which it wishes to exercise, unless it be so organized as to contain within itself the sufficient check. Attempts to restrain it from outrage by other means will only render it more outrageous."

It is respectfully submitted that the act of levying and collecting these duties from the plaintiffs was illegal, first, for the reason that it was in violation of section 8 of Article I of the Constitution, which grants to Congress the power to lay and collect duties, imposts, and excises, in that the duties so laid were not uniform throughout the United States; that they were, in fact, regulations of interstate commerce which Congress as a local legislature was incompetent to enact, and being taxes or duties of a national and not of a local nature, were subject to the uniformity restriction of the Constitution; and secondly, for the reason that the tax or duties were laid by Congress on articles exported from a State, in contravention of the 9th section of Article I of the Constitution, which prohibits Congress from laying taxes or duties on any such articles.

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No. 502.—October Term, 1900.

HENRY W. DOOLEY ET AL.

vs.

THE UNITED STATES.

For other briefs in this case in behalf of Dooley et al., see No. 501—the preceding case.

For briefs in behalf of The United States in this case, see No. 456. De Lima vs. Bidwell.